Michael D. Adams

15 May 2012

Federal Communications Commission
445 12th St SW
Washington, DC 20554

Re: Public Notice DA 12-523

To Whom It May Concern:

This is an extension to the comments I filed with the Commission on 4 April in regards to the request for comments.

Regarding potential expansion of PRB-1

In my comments, as well as those made by other respondents, there was has been an expressed desire not only for an expansion of PRB-1 to not only pre-empt antenna prohibitions imposed by homeowners associations, but also provide more detailed guidance as to what extent municipal and association prohibitions are exempted.

I understand that in issuing PRB-1, the Commission sought to walk a fine line between the Commission's charge to regulate communications services and the limits of both Commission and Federal authority (as a matter of law and regulation and/or as a matter of realism in a political environment) in issuing the minimum guidance necessary, and trusting that common sense would prevail in its application.

I suspect the Commission would find that treatment has worked in many states and communities. However, it has not been a universal success, and greater challenges would emerge if the Commission extended PRB-1 to be a preemption of deed restrictions imposed by many HOAs.

Most HOAs cannot be expected to have the resources on their own to appropriately determine what is or is not a reasonable restriction on amateur radio antennas. The limited ability for homeowners to appeal decisions made by their homeowners association boards and the tendency for a few HOAs to enthusiastically use fines and threats of litigation to react against selected minor infractions of covenants (as noted by some respondents) only serves to create a climate that would chill the efforts of amateur radio operators to work to find a reasonable compromise between a community's sense

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of aesthetics and the social value provided by permitting amateur radio operators the opportunity to practice their hobby and develop skills that will be useful in the event of an emergency.

Even at the municipal level, there is some cause to question whether municipalities, or even states, are finding an appropriate balance. I draw your attention to the case of *Alec Zubarau v. City of Palmdale*, where a California appellate court ruling has (perhaps erroneously) been described in part as:

> The Court opined that the small, VHF/UHF vertical on the roof constituted "reasonable accommodation" under PRB-1… The Court said that leaving Zubarau with a VHF/UHF antenna constituted a reasonable accommodation because it allowed him to be active in some part of Amateur Radio.[1]

Even if that quote were inaccurate or an oversimplification of the court's opinion, it is likely that a municipality or HOA hostile to antennas might be emboldened by such statements to take an excessively restrictive stance as to what constitutes a "reasonable accommodation".

If amateurs are to be expected to serve their communities in times of disaster, it is a matter of public interest that we have the capability and practice the skills necessary to operate on HF as well as VHF/UHF. Some regulators and probably many HOA board members need additional (or more explicit) guidance from the Commission on the subject.

I am not implying that hams have a constitutional right to 200-foot towers in their back yards in spite of any zoning requirements or deed restrictions to the contrary. I am, however, suggesting that it is unreasonable to prohibit a homeowner from erecting an effective HF antenna and an effective VHF/UHF antenna if he or she does so in a manner that minimizes visual impact without significantly sacrificing a reasonable level of effectiveness. I also suggest that it is always unreasonable to prohibit homeowners from erecting antennas that are not visible from the street. And, if the Commission should act to impose a partial preemption of antenna restrictions imposed by covenant restrictions, either as a direct result of this study or due to Congressional reaction to the study, I hope that action would be accompanied with more explicit guidance as to what might be considered "reasonable" or "effective" under the preemption.

Regarding Encryption

Some respondents have suggested that current rules generally prohibiting the Amateur Radio Service from engaging in encrypted communications impedes amateurs from providing communications assistance after a disaster when sensitive information (for example, information concerning the injuries or treatment of a specific individual) needs to be relayed. The suggestion made by these

[1] "Mixed Decision from the California Court of Appeals in Palmdale, California Antenna Case", American Radio Relay League, 8 February 2011

respondents is that the Commission should relax the prohibition to explicitly permit domestic encrypted communications in times of disaster and for associated training.

I cautiously agree.

I am concerned that encryption violates the traditional spirit of amateur communications and the Commission's long established presumption that amateur radio communications should not compete against commercial channels under normal conditions, and that there is a potential for encryption to be abused.

However, in a disaster, I personally would hate to be in a situation where I must either decline to relay a message because of a prohibition against encryption, or face the (hopefully remote) chance of being subject to litigation or prosecution because I either violated that prohibition, or because I complied with Commission rules and failed to encrypt such information.

In addition, as a result of my day job as a property casualty actuary, I am aware of guidance given to municipalities and organizations about the importance of protecting personally identifiable information from unauthorized individuals, and the role of encryption in providing that protection. The awareness of that risk can only serve to discourage such agencies from establishing relationships with (for example) local ARES groups as possible communications resources "if all else fails" due to their inability to encrypt sensitive information.

I should note that this subject is related to a question I tried to suggest in my initial response: should the amateur radio service be viewed as vital communications resource in the wake of disaster, or should the service be viewed as a training ground for a pool of auxiliary communicators, whose services and equipment can be quickly tapped by government and non-government disaster response organizations to operate under the organizations' Part 90 licenses?

That question (perhaps tweaked by the content of some responses received by the Commission) leads to four possibilities the Commission should consider when it comes to encryption:

- If the amateur radio service, as a whole, is viewed as a critical component of disaster response, Commission rules must be revised to permit encryption of domestic amateur communications for disaster response and associated training.

- If disaster response has evolved such that the amateur radio service would be better viewed as a potential pool of volunteers and cache of equipment to be tapped by government and non-government organizations for disaster response to operate under the organizations' own Part 90 licenses, no revision to the rules on encryption is necessary. However, the Commission should actively encourage appropriate federal agencies to develop programs to facilitate that relationship.

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- Some respondents have suggested the Commission revisit and revitalize the old rules on RACES. I agree that the RACES rules could be updated to reflect the ebbing of old grass-roots civil defense activities (of which RACES could be seen as an example), and the growth of disaster response structures such as CERT and the new Auxiliary Communications Services which are emerging in some parts of the country. If the Commission pursued this line of thinking (and if DHS/FEMA support could be secured for this refresh), the Commission could continue to deny encryption for general amateur use, but should explicitly permit encryption for operations by such "new RACES" entities.

- If the Commission found that it could not accept encryption of amateur communications under any circumstances, and if there were no formal linkage between the amateur radio service and disaster response organizations as described in the prior two points, the Commission should argue that appropriate legislation or regulation be secured to permit explicit safe harbor from prosecution or litigation at both federal and state levels due to failure to encrypt private information when such information must be communicated and amateur radio is the most logical means to do so.

Sincerely,

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